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No. 03-1301

Supreme Court, U.S.
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In the Supreme Court of the United States

GREGORY BURRIS,

Petitioner,

vs.

JERRY HILL,

Respondent .

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

REASON FOR GRANTING THE WRIT 2

I. THE SOLE ISSUE IN THE PETITION WAS ALSO THE SOLE ISSUE IN THE TRIAL COURT AND THE COURT OF APPEALS 2

II. PROBABLE CAUSE FINDINGS IN THE MANY CASES EXAMINED IN THE TRIAL COURT RECORD ARE NOT THE EQUIVALENT OF A DETERMINATION OF OBSCENITY 3

CONCLUSION 5

TABLE OF AUTHORITIES

Fort Wayne Books, Inc. v. Indiana
489 U.S. 46 (1989) 1, 5

Miller v. California
413 U.S. 15 (1973) 1, 3, 5

Roaden v. Kentucky
413 U.S. 496 (1973) 1, 4

ARGUMENT

State Attorney Jerry Hill tells this Court in his Brief in Opposition that there should be no concern about wholesale, systemic censorship in three Florida counties. Hill has the temerity to make the claim that "the record does not support the assertion that protected speech has been chilled."[1] Yet he fails to explain why a trial court record replete with many specific examples of massive self-censorship does not clearly demonstrate that presumptively protected speech has been irreparably chilled.[2] If Hill's position is legally correct, this Court's statements in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) about self-censorship were a waste of ink.[3] If this case does not establish self-censorship of a constitutional magnitude, and the ultimate transfer of the determination of contemporary community standards from the citizens of a jurisdiction to the prosecutorial arm of the government, no such case can ever be made.

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[1] Respondent's Brief in Opposition, at 3.

[2] Hill erroneously claims that he never prosecuted or threatened to prosecute anyone for selling "protected content materials." He fails to acknowledge that the materials that were the subject of his many RICO prosecutions *were* presumptively protected expression, *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973), and remained so unless and until "the trier of fact", *Miller v. California*, 413 U.S. 15, 24 (1973), determined otherwise. Thus, *everyone* who was targeted for closure, using RICO as the weapon, was prosecuted for selling presumptively protected materials of a sexual nature.

[3] As argued in the Petition, this Court rejected the self-censorship argument of Fort Wayne Books, Inc. because there was only an assertion of possible self-censorship. This case presents the situation where self-censorship was overwhelmingly established.

REASON FOR GRANTING THE WRIT

Mr. Hill does not contest the claim by Greg Burris that sexually explicit material has been totally removed from three Florida counties. Hundreds of thousands of Florida citizens have no opportunity to establish their own community standards for sexually explicit material. Mr. Hill is, to use a rather trite phrase, "the judge, jury and executioner" when it comes to the availability of such material in his three-county circuit. Unless this Court holds that the states *may not* make obscenity a predicate offense for RICO prosecutions, contemporary community standards will be determined by the government, and not by the people.

I. THE SOLE ISSUE IN THE PETITION WAS ALSO THE SOLE ISSUE IN THE TRIAL COURT AND THE COURT OF APPEALS.

According to Mr. Hill, "the lower courts were not presented with the question of establishment of contemporary community standards, and therefore the issue has not been preserved for review."[4] This, Mr. Hill tells us, is reason to deny the Petition.

Even a cursory reading of the trial court record establishes that Mr. Burris filed this lawsuit *for the sole purpose* of establishing that the irresponsible use of obscenity charges as RICO predicate acts causes a chilling effect. No person so charged, facing the possibility of the draconian consequences of a RICO conviction, would take his case to a jury.

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[4] Respondent's Brief in Opposition, at 4.

But what if one or more of those cases had gone to trial? As required, the trial judge would have to explain to the jury that the materials had to be judged under the *Miller* test. And the very first task of the trial jury would be to determine the contemporary community standards. Yet as a direct and foreseeable by-product of Mr. Hill's censorship campaign, how would a jury do that? The fact is that those jurors would have to guess, and no one would risk many years in a state prison on the hope that the jurors would guess right.

The issue of contemporary community standards *was* presented to both courts below. It was clearly included within the *argument* presented below, and is an argument in this Court. It is part and parcel of Burris' entire claim, and he is entitled to repeat that argument here.

II. PROBABLE CAUSE FINDINGS IN THE MANY CASES EXAMINED IN THE TRIAL COURT RECORD ARE NOT THE EQUIVALENT OF A DETERMINATION OF OBSCENITY.

Hill makes the statement that "Petitioner did not challenge the determination of probable cause in the lower courts."[5] One wonders how Burris might have done that.

Probable cause determinations are not adversarial. The State does not send a "notice of hearing" to the attorney for the target of its obscenity investigation, advising him or her of an adversary proceeding to

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[5] Brief in Opposition, at 6.

determine whether a particular videotape is "probably" obscene. A probable cause determination is, by its very nature, an *ex parte* process. The State gets to select which judge makes the determination. There is no record of any kind, no notes, no transcripts, nothing to later review. There is no prohibition against conversations between the reviewing judge and the investigating police officer (or, for that matter, the prosecuting attorney) concerning what the *officer or prosecutor* believes the contemporary community standards are. No one could ever establish that the reviewing judge "focus[ed] searchingly on the question of obscenity," *Roaden v. Kentucky*, 413 U.S. at 502. Hill's argument that somehow those nonadversarial, *ex parte* findings should be given any more credence than any probable cause finding simply ignores decades of obscenity jurisprudence, and marginalizes the role of the community in making the ultimate judgments on the acceptability of the materials involved.

There is a simple explanation for Hill's argument about this alleged "failure" to challenge the probable findings in the dozen or so RICO prosecutions in the trial court record. Hill wants this Court to accept his claim that there need not be any contemporary community standards so long as the *technical* requirement of a judicial determination of probable cause is met. But when RICO is involved, the probable cause finding becomes, *de facto* the ultimate determination of obscenity *vel non*. It is not the non-adversarial probable cause proceeding that is the problem. It is the use of RICO by a prosecutor determined (for whatever reason, personal, political, religious or otherwise), to eliminate access to sexually explicit materials from his jurisdiction that is the problem.

CONCLUSION

This is a critically important case, not only for Gregory Burris but for all Americans who wish to sell sexually explicit materials that are presumptively protected by the First Amendment. Burris and quite a few others have been quite forcefully dissuaded from selling adult materials in three Florida counties.[6] It follows, of course, that when the government can prevent the sale of a product, the product is less available in the marketplace . . . or not available at all!

The Court should note that the criminal prosecutions included in the Record were not against "organized crime," as that term was understood by the Congress when it first enacted the federal RICO statute.[7] These RICO prosecutions – and the threats of long prison sentences – were against "mom and pop" stores, small retail outlets carrying adult videotapes and magazines. This is an abuse of the RICO statute, and as enormous a chilling effect as could be imagined. If Jerry Hill can prevent the sale or rental of *all* sexually explicit material – obscene *and not obscene* – from three Florida counties, any other prosecutor can do the same. Whether for personal, religious, political or other reasons, no prosecuting attorney can be allowed to decide *by himself* what the contemporary standards of any community are. *Miller* never contemplated such a thing.

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[6] It would not be possible to ever know how many others were similarly persuaded to "open up elsewhere" because of Hill's well-publicized RICO tactic.

[7] Florida's RICO statute is a virtual carbon copy of the federal statute.

The Court should grant the Petition, so it can now decide the unanswered question in *Fort Wayne Books*: whether the use of obscenity offenses as predicate acts for RICO prosecutions has an unconstitutional chilling effect on freedom of sexual expression.

Respectfully submitted,

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